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No. 87-271

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

HARBISON-WALKER REFRACTORIES,
A DIVISION OF DRESSER INDUSTRIES, INC.,
Petitioner,
v.
EUGENE F. BRIECK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a plaintiff who alleges intentional discrimination can survive summary judgment merely by questioning his employer's business judgment, without presenting any evidence, direct or indirect, that his employer's judgment was in fact motivated by an intent to discriminate?

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BRIEF FOR PETITIONER

OPINIONS BELOW

The unreported opinion of the United States Court of Appeals for the Third Circuit appears in the Appendix to the Petition for Certiorari ("Pet. App.") at pp. 1a to 11a. The December 19, 1985 opinion and order of the United States District Court for the Western District of Pennsylvania granting Petitioner's motion for summary judgment is reported at 624 F. Supp. 363, and is reproduced in the Appendix to the Petition at pp. 12a to 21a. The District Court's January 16, 1986 memorandum opinion and order denying Respondent's request for reconsideration are unreported and appear in the Appendix to the Petition at pp. 22a to 25a.

JURISDICTION

The judgment of the Court of Appeals was entered on June 19, 1987. Petitioner filed a timely petition for a writ of certiorari on August 17, 1987, which this Court granted by Order dated March 21, 1988. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1) (1982).

STATUTE INVOLVED

Section 4(a)(1) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.* (1982) ("ADEA" or the "Act"), provides in pertinent part that:

> It shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age. . . .

29 U.S.C. § 623(a)(1) (1982).

STATEMENT

This case involves the business decision of Petitioner, Harbison-Walker Refractories, a Division of Dresser Industries, Inc. ("Harbison-Walker" or the "Company"), to lay off Respondent Eugene Brieck during an economically-induced reduction in force. The Company, which sells specialized ceramic brick products primarily to steel producers (Affidavit of William Sekeras, ¶ 2; Joint Appendix ("J.A.") 12), hired Respondent in June 1965 as a specialist to supervise the installation of those products (Deposition of Eugene Brieck, J.A. 59-60). Respondent worked in the Company's Iron and Steel Marketing Support Group (the "Steel Group"), which employed three other installation specialists as of July 1982. Sekeras Affidavit, Ex. D (J.A. 31). The ages and years of service of the four installation specialists were as follows:

	Age	Years of Service
Eugene Brieck	55	17 years
W.L. Meixell	59	2 years/6 months
Al Malarich	59	15 years/10 months
Hugh Faust	39	15 years/9 months

Id.

Between 1980 and 1982, the Company's sales of ceramic brick products had fallen nearly 35 percent due to the economic decline among its steel industry customers. Sekeras Affidavit, Ex. A (J.A. 17). Mirroring decreased sales, the Company's profits from the sale of brick products plummeted from approximately $64 million in 1979 to a deficit of $20 million in just three years. *Id.* Service functions tied to the Company's brick sales, including installation work, also declined substantially. Sekeras Affidavit, ¶ 9 (J.A. 14); Deposition of Larry Sheatsley (J.A. 103-05).

Faced with mounting losses, Harbison-Walker began to reduce headcount in early July 1982. Sekeras Affidavit, ¶ 3-4 (J.A. 12-13). In making difficult layoff decisions, the Company considered both "[l]ength of company service and skill requirements necessary to carry out the reduced business activities . . . ." *Dresser News* (J.A. 47); Sekeras Affidavit, ¶ 4 (J.A. 13). The Company's Vice-President of Marketing emphasized the need for flexible and multi-skilled workers in a July 8, 1982 memorandum to the Company's regional offices (J.A. 118):

> With this reduction in forces, there will be considerable overlapping of job responsibilities and I am counting on each of you to pull your teams together to fully accomplish maximum sales under these conditions. Sales people will be required to do service work in the warehouses as needed, answer telephones as required, and follow installations as required.

Applying these standards, in July 1982, the Company initially laid off six of the 32 employees in the Steel

Group, including two installation specialists: Respondent, then 55 years of age, and Meixell, an older but substantially less senior installation specialist. Sekeras Affidavit, Ex. F (J.A. 33). It retained two other long-service installation specialists, 59-year-old Malarich and 39-year-old Faust, both of whom had almost as much seniority as Respondent. *Id.* It retained these two installation specialists because their varied experience made them the most versatile. Sekeras Affidavit, ¶ 9 (J.A. 14-15); Sheatsley Deposition (J.A. 105-06). Indeed, Faust was an ideal candidate for retention because, for the last several years, he had split his time almost equally between performing installation work and office work. Deposition of Hugh Faust (J.A. 156).

Within a month, the Company laid off Malarich, but retained Faust for an additional four months. Sekeras Affidavit, Ex. F (J.A. 33); Sheatsley Deposition (J.A. 111-12). Because of his diverse skills and broad experience, Faust was more versatile than the other specialists, including Respondent. Faust—unlike Respondent—had considerable prior experience with records and written reports, substantial experience in customer relations and in preparing bids and quotations, and experience in installation work in blast furnace casthouses—a targeted growth area for Harbison-Walker. Sekeras Affidavit, ¶ 9 (J.A. 14-15); Sheatsley Deposition (J.A. 105-06); Faust Deposition (J.A. 149-55). In addition, Faust had higher performance ratings than Respondent in three of the four years between 1978 and 1981. Sekeras Affidavit, ¶ 9 (J.A. 15).

On November 18, 1982, when economic conditions remained poor, the Company laid off Faust, its only remaining installation specialist. Sekeras Affidavit, Ex. F (J.A. 33). As of that date, the Steel Group—which had employed 32 individuals just five months earlier—had shrunk to 21 employees. *Id.*, Ex. E (J.A. 32). Of these 21 employees, over half were over age 40. *Id.* In fact, only three of the twelve employees laid off from the

Steel Group, the three installation specialists, were 40 years of age or older. *Id.*, Ex. F (J.A. 33).[1]

In the spring of 1983, Harbison-Walker recalled Malarich, the oldest installation specialist, for a temporary project and ultimately for a permanent position in the Steel Group. Deposition of Donald Jamison (J.A. 123-25). When Malarich decided to retire voluntarily at age 60, the Company recalled Faust. *Id.* It recalled Faust, instead of Respondent, for the same reasons that it had retained Faust longer: his greater versatility. Sekeras Affidavit, ¶ 9 (J.A. 15). After his recall, Faust performed installation work for approximately 75 percent of his time. Faust Deposition (J.A. 159-60). He spent the remaining portion of his time performing work consisting, at least in part, of tasks that Respondent had neither the experience nor training to perform. *Id.*

The Proceedings Below

On June 29, 1984, Respondent filed suit against Harbison-Walker, alleging that the Company terminated and failed to recall him because of his age in violation of the ADEA (J.A. 2-7).[2] After discovery, the Company moved for summary judgment. It argued that Respondent had not established a prima facie case of age discrimination under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); that, even assuming that he had, the Company terminated him for legitimate, nondiscrimi-

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[1] To ensure adequate protection for its more senior employees in layoffs and compliance with federal equal employment opportunity requirements, the Company had in place—and followed in this case—a policy requiring corporate review of any layoff recommendation affecting an employee with more than 15 years of service. That review process, as applied to Respondent, resulted in affirming the layoff recommendations of his supervisors. Deposition of John Nicolella (J.A. 128-32).

[2] Respondent filed his administrative charge, a jurisdictional prerequisite to his subsequent lawsuit, on July 19, 1982, shortly after the Company had laid him off but had retained Malarich and Faust (J.A. 6).

natory business reasons; and that Respondent failed to produce any evidence that the Company's proffered business reasons were a pretext for age discrimination.

To support its motion, the Company offered admissible evidence to demonstrate that the economic downturn in its business necessitated the reduction in force that eliminated Respondent's job; that Faust had higher performance ratings than Respondent; and that Faust had skills in marketing and administrative matters—skills that Respondent had neither the experience nor the training to perform—which the Company could draw upon in a reduced work environment. The Company, moreover, produced the following positive evidence that age played no role in its decision to lay off Respondent: (a) Company policy gave positive credit for years of service in layoffs; (b) the Company required a high-level review of any decisions to lay off an employee with more than 15 years of service; (c) only three of the twelve employees laid off from the Steel Group in 1982 were over age 40; (d) after the layoffs, over half of the employees remaining in the Group were over age 40; (e) the average age of the Group actually increased as a result of the layoffs, from 38.25 years in June 1982 to 39.61 years in December 1982; (f) the Company recalled an older installation specialist, 59-year-old Malarich, in 1983 before Faust; and (g) the Company had hired Meixell as an installation specialist in 1980 when he was 57 years of age.

Respondent opposed summary judgment. In so doing, however, he did not dispute the objective facts underlying the Company's decision. He conceded that the economic downturn in Harbison-Walker's business prompted his layoff (J.A. 94), that Faust had more diverse skills than Respondent (J.A. 52-53), and that the Company, from time to time, drew upon those more diverse skills in the reduced work environment (J.A. 44). He did not come forward with any specific facts—other than the undis-

puted fact that Respondent was older than Faust—to show that a genuine dispute existed for trial. He produced no direct evidence that age in any way motivated Harbison-Walker's decision and no indirect evidence (e.g., evidence of age-related remarks or statistics) of age discrimination. Brieck Deposition (J.A. 94-96). Instead, Respondent opposed summary judgment with nothing more than self-serving statements that he believed he was better qualified than Faust to perform any available installation specialist work, that he believed he could have been trained to perform the marketing and administrative functions that Faust could already perform, and that, in any event, he believed Faust's superior experience was unimportant because he spent less than 25 percent of his time, after recall, on matters requiring that experience (J.A. 44, 51-53).

Finding no material facts in dispute, the district court granted the Company's summary judgment motion. Although holding that Respondent had established a prima facie case of age discrimination, it nonetheless concluded that the Company had advanced legitimate, nondiscriminatory business reasons for its decision to lay off Respondent instead of Faust. Pet App. 15a-17a. It found that, although Faust had slightly less seniority than Respondent, he had better performance evaluations and broader experience in marketing and administrative functions. Pet. App. 16a. Rejecting Respondent's efforts to downplay the importance of Faust's more diverse experience, the court noted that "[a]ny question about the appropriateness of how Faust spends his time edges into the area of judicial scrutiny of business decisions." Pet. App. 17a. Because Respondent merely questioned the Company's business judgment, without "forg[ing] the critical link between [the challenged] actions and [Respondent's] age with *relevant* proof," Pet. App. 23a (emphasis in original), Respondent's conclusory statements could not discharge his burden of persuasion that age motivated the Company's decision. In so holding, the district court noted that the indirect evidence proffered

by the Company (e.g., the statistics showing that the Company had an older workforce after the 1982 layoffs) "further highlight[s] Mr. Brieck's absence of proof that defendant's justification for his layoff is a pretext for age discrimination." Pet. App. 17a. Thus, absent evidence that any possible error in Harbison-Walker's business judgment was a pretext for age discrimination, the district court declined Respondent's invitation to second-guess the Company's decision.

The Third Circuit reversed. It held that, on summary judgment, the Company bears the "burden" of demonstrating that the plaintiff "will be unable to introduce either direct evidence of a purpose to discriminate, or indirect evidence of that purpose by showing that the proffered reason is subject to factual dispute." Pet. App. 4a. Although Respondent had produced no evidence—other than the age differential between him and Faust—linking the Company's decision to age, the court below concluded that Respondent's self-serving assessment of his employer's business needs precluded summary judgment. Focusing on the fact that, in hindsight, Faust spent less than 25 percent of his time, after recall, on matters requiring his diverse skills—the sole fact which the court below deemed "inconsistent" with the Company's asserted reason for retaining him—the court below stated:

> We held in *Chipollini* that to defeat a summary judgment motion based only on an employer's proffered evidence of a non-discriminatory animus, an ADEA plaintiff's evidence need only permit a reasonable inference that the employer's proffered explanation for the discharge is unworthy of credence. We find that the record before us contains 'evidence of inconsistencies and implausibilities in the employer's proffered reasons for discharge (which) reasonably *could* support an inference that the employer did not act for (those) non-discriminatory reasons.'

Pet. App. 2a, citing *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893 (3d Cir), *cert. dismissed on stipulation*, 108 S. Ct. 26 (1987). Because the court below viewed the only "question on summary judgment [to be] whether evidence of the duties actually performed by Faust upon his recall could cast doubt on the defendant's assertion that Faust was retained because of his more diverse skills"—a question that it answered affirmatively—it reversed the district court's grant of summary judgment. Pet. App. 6a.

Judge Weis dissented. He found that Respondent's subjective appraisal of his and Faust's qualifications did not demonstrate any implausibility in the Company's principal stated reason for preferring Faust, in that Respondent admitted that his skills did "not match his rival's diverse abilities." Pet. App. 10a.[3] Focusing on the "implausibility" that the majority found dispositive, Judge Weis reasoned (Pet. App. 9a-10a):

> [P]laintiff contends that because Faust spent twenty-five percent of his time after recall preparing reports of installations (an activity Brieck had performed) as well as working on 'margins' and filing (tasks which Brieck neither had done nor was trained to do), the employer has failed to demonstrate its need for Faust's diverse qualifications. . . .
>
> When reduced company operations warrant the service of one installation specialist for only seventy-five percent of his time, efficiency requires some utilization of the remaining twenty-five percent. Although plaintiff may argue he could work as effectively for

[3] Noting that Malarich was not only older than Respondent, but better qualified, Judge Weis stated:

> If the company needed only one installation specialist and if Faust's qualifications were as inadequate as plaintiff believes, then one would have expected defendant to furlough Faust. But in that event, Malarich, and not plaintiff, would have been the one retained. The plaintiff's failure to address the fact that Malarich was given preference undercuts the claim of discrimination in favor of Faust at the time of the plaintiff's layoff.

Pet. App. 8a-9a.

> part of that time, significantly he cannot prove his ability to perform equally well for the entire 25 percent period. The concession that he, unlike his rivals, might require training only underscores the validity of the employer's reason for selecting Faust.

Judge Weis thus concluded that Respondent had "failed to show a dispute of fact on a material issue which would demonstrate pretext." Pet. App. 11a.[4]

SUMMARY OF ARGUMENT

The decision below discards an essential element of evidence required in employment discrimination cases since this Court's decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973): proof of unlawful discrimination. The decision below means that a plaintiff who alleges intentional age discrimination can present his case to a jury merely by questioning his employer's business judgment and without producing any direct or indirect evidence that discrimination motivated that judgment. That standard cannot be squared with the principles consistently laid down by this Court.

The decision below ignores the well-settled principle that the ultimate burden of persuasion in a discrimination case "remains at all times with the plaintiff" who must "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Although that burden need not be met with direct evidence of discrimination, it must be met with *some* sort of evidence that discrimination played a role in the challenged decision. The decision below

[4] In so concluding, Judge Weis distinguished the majority opinion that he had joined in *Chipollini*. He reasoned that in *Chipollini*, unlike here, the laid-off plaintiff produced specific evidence that contradicted the facts proffered by the employer in support of its decision. Pet. App. 10a.

aptly demonstrates the pitfalls of requiring less. It means that, where a plaintiff can point to some age-neutral evidence that his employer, in his opinion, made a less than perfect business decision, juries can substitute their own notion of "fairness" for the employer's business judgment. This Court's conclusion in *Burdine* that a plaintiff can prove pretext with indirect evidence that the employer's explanation for its decision is "unworthy of credence" neither requires nor permits that result.

Nor can the decision below be reconciled with this Court's principles governing summary judgment. Summary judgment *must* be entered against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The court below substantially enlarged the Company's legitimate summary judgment burden (i.e., to prove that all material facts are undisputed) by requiring the Company to prove that the plaintiff will be "unable" to produce any evidence of discrimination. Such a burden is not only virtually impossible to satisfy, but it alters the burdens that this Court has defined under Rule 56 of the Federal Rules of Civil Procedure. Allowing trials in cases where, as here, a plaintiff has produced no direct or indirect evidence of age discrimination—even though he bears the ultimate burden of proving discrimination at trial—thwarts the policies underlying Rule 56 and this Court's summary judgment decisions.

Although economic reductions in force create difficult business decisions for employers and produce sympathetic victims, the ADEA provides redress only where age discrimination played a role in those decisions. Because Respondent offered no evidence that age played such a role here, the Court should reverse.

ARGUMENT

I. THE DECISION BELOW FAILS TO FOLLOW THIS COURT'S DECISIONS GOVERNING THE EVIDENTIARY BURDENS APPLICABLE TO EMPLOYMENT DISCRIMINATION CASES.

The decision below fails without warrant to follow the principles established by this Court to govern the burdens of proof in employment discrimination cases. Reduced to its core, the decision below permits an ADEA plaintiff to present his case to a jury without producing any direct or indirect evidence linking a challenged employment decision to age discrimination. It does so even though the ultimate burden of proving age discrimination "remains at all times with the plaintiff," *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 253, citing *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25 n.2 (1978), and even though summary judgment is proper against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Because the decision misinterprets the crucial inquiry in age discrimination cases—namely, whether the plaintiff has produced sufficient evidence from which a jury can conclude that he is a victim of discrimination "because of [his] age," 29 U.S.C. § 623(a)(1) (1982)—this Court should reverse the decision below.

A. The Court Below Misapplied The Well-Established Substantive Standards Applicable To Employment Discrimination Cases.

The well-settled principles articulated by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. at 802-05, and its progeny, govern this case.[5] Under the evidentiary framework established in *McDonnell Douglas*, a plaintiff bears the initial "burden of proving by the preponderance of the evidence a prima facie case of discrimination." *Burdine*, 450 U.S. at 252-53; *see also McDonnell Douglas*, 411 U.S. at 802.[6] Once he does so, giving rise to a "presumption that the employer unlawfully discriminated against the employee," *Burdine*, 450 U.S. at 254, the burden then "shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employ[ment action].'" *Burdine*, 450 U.S. at 253, *quoting McDonnell Douglas*, 411 U.S. at 802; *see also Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978). If the employer carries this burden of production, it "destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence," and "the factual inquiry proceeds to a new level of specificity." *Burdine*, 450 U.S. at 255 and n.10.[7]

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[5] Although *McDonnell Douglas* involved race, rather than age, discrimination, courts have applied its evidentiary framework, almost without exception, to the ADEA. *See Dale v. Chicago Tribune Co.*, 797 F.2d 458, 462 n.1 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 954 (1987); *Thornbrough v. Columbus & Greenville Railroad Co.*, 760 F.2d 633, 638 n.4 (5th Cir. 1985); *Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393, 1396 (3d Cir.), *cert. denied*, 469 U.S. 1087 (1984); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1014-19 (1st Cir. 1979); *but see Simpson v. Midland-Ross Corp.*, 823 F.2d 937, 940-41 (6th Cir. 1987); *Laugesen v. Anaconda Co.*, 510 F.2d 307, 312 (6th Cir. 1975).

[6] This burden is "not onerous." *Burdine*, 450 U.S. at 253. Indeed, in some circuits, including the Third Circuit, a plaintiff can establish a prima facie case merely by demonstrating that he is in the protected age group and was laid off while younger employees were retained in similar jobs for which he was qualified. *See Duffy v. Wheeling-Pittsburgh Steel Corp.*, 738 F.2d at 1395; *Massarsky v. General Motors Corp.*, 706 F.2d 111, 118 (3d Cir.), *cert. denied*, 464 U.S. 937 (1983); *Thornbrough v. Columbus & Greenville Railroad Co.*, 760 F.2d at 641-45; *but see Simpson v. Midland-Ross Corp.*, 823 F.2d at 941; *Leichihman v. Pickwick International*, 814 F.2d 1263, 1270 (8th Cir.), *cert. denied*, 108 S. Ct. 161 (1987).

[7] Thus, it is obvious that "[a] *McDonnell Douglas* prima facie showing is not the equivalent of a factual finding of discrimination." *Furnco*, 438 U.S. at 579. But even though "the presumption

Because the ultimate burden of persuasion "remains *at all times* with the plaintiff," he must then "prove by a preponderance of evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Id.* at 253 (emphasis added). As this Court explained in *Burdine*:

> *This burden now merges with the [plaintiff's] ultimate burden of persuading the court that she has been the victim of intentional discrimination.* She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or *indirectly by showing that the employer's proffered explanation is unworthy of credence. See McDonnell Douglas*, 411 U.S., at 804-05.

Id. at 256 (emphasis added). Once the plaintiff has had the opportunity to do so, the factfinder must then decide the ultimate issue: whether "the defendant *intentionally discriminated* against the plaintiff." *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983) (emphasis added).

Viewing the evidence presented "through the prism of the[se] substantive evidentiary burden[s]," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986), it is plain that where an employer, in moving for summary judgment, offers legitimate, nondiscriminatory reasons for its conduct, an ADEA plaintiff must produce specific facts to create a genuine dispute as to the essential element of his case: whether "the legitimate reasons offered by the defendant were . . . a *pretext for* [*age*] *discrimination.*" *Burdine*, 450 U.S. at 253 (emphasis added). To do so, he need not produce direct evidence of discriminatory intent. *Aikens*, 460 U.S. at 714 n.3. *Burdine* and *Aikens* make clear that a plaintiff can rely upon indirect

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drops from the case" when the employer explains its conduct, the factfinder may nonetheless consider the plaintiff's initial evidence in deciding the ultimate issue of discrimination. *Burdine*, 450 U.S. at 255 n.10.

evidence to demonstrate that the employer's reason is a pretext for prohibited discrimination and is "unworthy of credence." But that indirect evidence must be sufficiently probative of the ultimate issue in the case—discrimination on the basis of age—so that "a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 252.[8] Thus, a jury could infer discrimination from indirect evidence that an employer made a particular employment decision in contravention of established and consistently-applied procedures, *see, e.g., Krodel v. Young*, 748 F.2d 701, 710 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 817 (1985); that management personnel made comments reflecting a negative attitude toward older workers, *see, e.g., Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1529-30 (11th Cir. 1987); *Krodel v. Young*, 748 F.2d at 710; *Perez v. Curcio*, 841 F.2d 255, 257-58 (9th Cir. 1988); that company documents indicate a preference for younger employees, *see, e.g., Loeb v. Textron, Inc.*, 600 F.2d at 1017; or that relevant statistics demon-

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[8] *See Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983) (to avoid summary judgment based on challenges to an employer's proferred reasons, employees must produce "specific, substantive evidence of pretext and that age was a determining factor in the decision"); *Young v. General Foods Corp.*, 840 F.2d 825, 829 (11th Cir. 1988) ("Because the plaintiff bears the burden of establishing pretext, he must present 'significantly probative' evidence on the issue to avoid summary judgment"); *Askin v. Firestone Tire & Rubber Co.*, 785 F.2d 307 (6th Cir. 1986), *aff'g without opinion*, 600 F. Supp. 751, 755-56 (E.D. Ky. 1985). The nature and quantum of that evidence may vary depending upon the employer's proffered reasons. *See Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 595-96 (11th Cir. 1987); Milone, *Age Discrimination: Proving Pretext Under the ADEA*, 13 Empl. Rel. L.J. 104, 118-19 (1987). Because, in this case, the facts underlying the employer's stated reasons are undisputed, *see* discussion *supra* at 6-7, this Court need not decide here whether summary judgment is proper where a plaintiff shows that the employer's proffered reason for its action is objectively false.

strate a pattern of adverse treatment of older workers. *See generally McDonnell Douglas*, 411 U.S. at 804-05.[9]

These principles require reversal here. In concluding that Respondent is entitled to present his case to a jury, the court below effectively relieved him of his burden of producing specific facts linking the challenged employment decision to age discrimination. Despite *Burdine's* mandate, Respondent produced no direct evidence that Harbison-Walker's decision was motivated by age discrimination. Nor did he present any indirect evidence that the Company's proffered reasons were "unworthy of credence." To the contrary, Respondent conceded the objective facts underlying the Company's proffered reasons for its retention of Faust instead of Respondent. The court below so found: Respondent "introduced no evidence to counter the assertion that Faust's prior experience with office matters . . . distinguishes his qualifications from those of [Respondent]" and that "there is no issue regarding the appropriateness of Harbison-Walker's employment of Faust." Pet. App. 4a, 6a.[10]

Despite the objective accuracy of the Company's proffered reasons and despite the substantial indirect evidence negating age discrimination, the court below concluded that Respondent should nonetheless be permited to take his case to a jury. It did so by finding that Respondent had "cast doubt" on the credibility of

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[9] The reason for requiring evidence linking an employment decision to age is obvious. An employer can have "pretextual", but entirely benign, reasons for its action. *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d at 903 (Hunter, J., dissenting).

[10] On the evidence presented, the court could not have found otherwise. *See Dale v. Chicago Tribune Co.*, 797 F.2d at 464 (an ADEA plaintiff cannot survive summary judgment merely by "challeng[ing] the judgment of his superiors through his own self-interested assertions"). An even cursory review of Respondent's affidavit reveals that it is bottomed not on substantiating facts, but on self-serving allegations that he was, e.g., the most qualified and versatile installation specialist (J.A. 51-54).

the Company's stated reasons—based only on the fact that, in hindsight, the Company used Faust's more diverse skills after his recall less than 25 percent of the time—so as to "permit a reasonable inference that the . . . proffered explanation . . . is unworthy of credence." Pet. App. at 2a. But *Burdine*'s "unworthy of credence" language requires more. A finding of pretext does not flow—directly or inferentially—from evidence that merely casts doubt on the wisdom of the employer's stated reason. *See White v. Vathally*, 732 F.2d 1037, 1043 (1st Cir.), *cert. denied*, 469 U.S. 933 (1984) ("[m]erely casting doubt on the employer's articulated reason does not suffice to meet the plaintiff's burden of demonstrating discriminatory intent").[11] To meet his burden of creating a genuine dispute as to pretext, therefore, Respondent had to do more. He had to produce probative evidence from which a fair-minded jury could infer "that the legitimate reasons offered by the defendant were not its true reasons, but were a *pretext for discrimination.*" *Burdine*, 450 U.S. at 253 (emphasis added); *see also McDonnell Douglas*, 411 U.S. at 805 (emphasis added) (plaintiff must prove "by competent evidence that the presumptively valid reasons for [the employment action] were in fact a coverup for a . . . *discriminatory* decision").

Respondent produced—and the court below required—substantially less. Respondent presented no specific facts, beyond the fact that the laid-off installation specialists were older than Faust, to demonstrate that the Company's articulated reasons were pretextual. He pointed to no documents or oral remarks suggesting that the Company harbored animus toward older workers, no evidence that the Company failed to comply with cor-

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[11] *See also Simpson v. Midland-Ross Corp.*, 823 F.2d 937, 941 (6th Cir. 1987); *Dea v. Look*, 810 F.2d 12, 15 (1st Cir. 1987).

porate procedures or applied them in a discriminatory manner, and no statistics relevant to or probative of age discrimination. He failed to do so, moreover, in the face of substantial objective evidence that the Company's action was age-neutral. That evidence—e.g., that the Company generally rated Faust's job performance higher than Respondent's; that over half of the employees in the post-reduction Steel Group were in the protected age group; that only three of the twelve employees laid off from that group were over age 40; that the Company followed its informal layoff criteria, requiring consideration of length of service *and* needed skills in a reduced work environment, in retaining Faust instead of Respondent; and that the Company initially retained and recalled an *older* employee, Malarich, instead of Respondent—plainly negates any inference of age discrimination.[12]

The contrary conclusion of the court below is thus wrong as a matter of fact and law. Because Respondent failed completely to forge any link between the challenged decision and age discrimination, the court below erred in concluding that a fair-minded jury could infer that the Company discriminated against him "because of [his] age." 29 U.S.C. § 623(a)(1) (1982). To conclude otherwise—and permit ADEA plaintiffs to defeat summary judgment without producing any direct or indirect evidence of age discrimination—would drastically alter the evidentiary framework established by this Court to govern employment discrimination cases.

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[12] *See Grigsby v. Reynolds Metal Co.*, 821 F.2d 590, 596 (11th Cir. 1987) ("conclusory allegations of discrimination, without more, are not sufficient to raise an inference of pretext or intentional discrimination where [an employer] has offered . . . extensive evidence of legitimate, nondiscriminatory reasons for its actions"); *see also Young v. General Foods Corp.*, 840 F.2d at 830.

B. The Standard Applied By The Court Below Improperly Permits ADEA Plaintiffs To Survive Summary Judgment Merely By Challenging The Wisdom Of Their Employer's Business Judgment.

Not only does the standard applied by the court below read age out of the well-established analytical framework for discrimination cases, but its overly literal interpretation of *Burdine*'s "unworthy of credence" language collides with another principle established by this Court: that the ADEA "was not intended to 'diminish traditional management prerogatives.'" *Burdine*, 450 U.S. at 259, quoting *United Steelworkers of America v. Weber*, 443 U.S. 193, 205-06 (1979).[13] The Third Circuit's standard—which permits an ADEA plaintiff to survive summary judgment merely by challenging his employer's business judgment and without producing any evidence that age motivated that judgment—improperly converts the ADEA into "a vehicle for judicial review of business decisions." *Kephart v. Institute of Gas Technology*, 630 F.2d 1217, 1223 (7th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981). It should be reversed.

That a pretext standard divorced from age opens the door for courts and juries to second-guess an employer's business judgment is all too evident here. Relying on its interpretation of *Burdine*'s "unworthy of credence" language, the court below found that a jury could find pretext based solely on a post-hoc analysis of the facts, i.e., by examining events occurring long after the Company

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[13] This Court has recognized that "Title VII would not have been enacted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business." *United Steelworkers of America v. Weber*, 443 U.S. at 207. These "legislators demanded as a price for their support that 'management prerogatives . . . [would] be left undisturbed to the greatest extent possible.'" *Id.* at 206, *quoting* H.R. Rep. No. 915, 88th Cong., 2d Sess., pt. 2, at 29 (1963). *See also Local No. 93, International Association of Firefighters v. City of Cleveland*, 478 U.S. 501, 106 S. Ct. 3063, 3075 (1986).

made its allegedly unlawful decision to lay off Respondent in July 1982. According to the court below, the proper benchmark for assessing the propriety of the Company's decision to retain Faust longer than Respondent and to recall Faust from layoff was the type of work that Faust performed after his recall in August 1983—over a year after Respondent's layoff. The court below concluded that this after-the-fact review, which showed that Faust worked less than 25 percent of his time on projects for which Respondent was not trained, demonstrated the inappropriateness of summary judgment and, by implication, overcame both the absence of any evidence of discriminatory motive and the presence of evidence showing the Company's age-neutral conduct. To adopt this misfocused analysis, however, would not only require an astounding business prescience on the part of the Company, but would permit juries to assess virtually all business judgments in ADEA cases even though no evidence links those judgments to age discrimination. The relevant question is not what Faust did do when he returned to employment, but what Faust was capable of doing, and what the Company reasonably expected Faust might do, at the time Respondent was laid off.

In effect, the decision below means that an employer can never prevail on summary judgment—despite the absence of direct or indirect evidence of age discrimination—if it makes a less than perfect assessment of its future personnel needs based on less than stable economic predictors. But neither the ADEA nor *Burdine's* "unworthy of credence" language requires an employer to make a perfect business decision or even a good one. *See Dale v. Chicago Tribune Co.*, 797 F.2d at 464. Rather, "[t]he ADEA only requires the intervention of the federal judiciary when age is a determining factor in the decision." *Parker v. Federal National Mortgage Association*, 741 F.2d 975, 981 (7th Cir. 1984). Because age is not a factor here, the Company's business judgment should not be disturbed.

II. THE COURT BELOW APPLIED AN INCORRECT STANDARD UNDER RULE 56 AND REACHED A RESULT INCONSISTENT WITH THE POLICIES UNDERLYING THE RULE.

The decision below contravenes this Court's interpretation of Rule 56 of the Federal Rules of Civil Procedure. Contrary to the principles confirmed in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), the decision below plainly misallocates the burdens on summary judgment, focuses on immaterial facts to deny summary judgment, and emasculates the policies underlying Rule 56. It should be reversed.

A. The Court Below Improperly Required The Company To Negate Respondent's Claims.

An employer seeking summary judgment in an employment discrimination case bears the burden of showing the absence of a genuine issue of material fact. *See* Fed. R. Civ. P. 56(c). But *Celotex* makes clear that the movant need not produce evidence "negating the opponent's claim." 477 U.S. at 323. The movant is not required "to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof," but can instead discharge its burden "by 'showing'—that is, pointing out to the district court that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325.

The Company satisfied that burden below. Although it pointed out the complete absence of record evidence to support a finding of age discrimination,[14] the court

[14] In fact, it did more. It proffered legitimate, nondiscriminatory reasons for its action—Faust's more diverse skills and higher performance ratings—and produced substantial indirect evidence that it harbored no unlawful animus toward older workers in general or Respondent in particular. *See* discussion *supra* at 5-6, 18.

below found summary judgment to be inappropriate. In so doing, it imposed on the Company a burden more substantial than *Celotex* requires: to "show that the plaintiff will be *unable* to introduce either direct evidence of a purpose to discriminate, or indirect evidence of that purpose by showing that the proffered reason is subject to factual dispute." Pet. App. at 4a (emphasis added). That burden requires the Company to disprove an essential element of Respondent's case, i.e., that the employer's proffered reasons were a pretext for discrimination, in clear derogation of this Court's conclusion in *Celotex*.

In short, by placing too great a burden on the Company, the decison below effectively relieved Respondent of his own summary judgment burden. Respondent had to—but plainly did not—"make a showing sufficient to establish the existence of an element essential to [his] case." *Celotex Corp. v. Catrett*, 477 U.S. at 322. Because nothing in Rule 56 or this Court's decisions permits Respondent to escape "his own burden of producing . . . evidence that would support a jury verdict," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 256, the decision below should be reversed.

B. The Court Below Erred In Finding That There Were Material Facts In Dispute.

To survive summary judgment, Respondent had to "come forward with 'specific facts showing that there is a *genuine issue for trial.*'" *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. at 587 (emphasis in original). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 247-48 (emphasis in original). By concluding that summary judgment was inappropriate here based on evidence which—even if disputed—"could not lead a rational trier of fact to find for the nonmoving party," *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. at 587, the court below erred.

Although Faust indisputably spent some, though less than 25 percent, of his post-recall time doing sales and office work for which Respondent was neither experienced nor trained, the Third Circuit apparently found a disputed material fact in conflicting inferences that could be drawn from that evidence. Whatever inferences may be drawn, however, are not material to the ultimate issue of discrimination. What Faust did after recall is immaterial to the Company's intent when it decided—a year earlier—to retain a multi-skilled employee instead of an employee with less diverse skills. Indeed, had Faust performed installation work for 100 percent, rather than 75 percent, of his time after recall, that fact—without more—would not be sufficiently probative of whether the Company intentionally discriminated against Respondent because of his age in 1982. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 249-50 (if the evidence presented "is not significantly probative . . . summary judgment may be granted").[15]

In short, the "dispute" in this case did not concern "facts that might affect the outcome of the suit under the governing law". *Id.* at 248. Respondent's complete failure to adduce evidence concerning the essential element of his case—discrimination on the basis of age—necessarily renders evidence as to how Faust spent his time after recall immaterial. *Celotex Corp. v. Catrett*, 477 U.S. at 323. Thus, viewing "the record taken as a whole"—as the court below was required to do—no "ra-

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[15] If anything, the undisputed fact that the Company utilized Faust's diverse skills to some degree after recall supports, rather than contradicts, the Company's principal reason for retaining and recalling him.

tional trier of fact [could] find for [Respondent]" on his age discrimination claim. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. at 587. The court's failure properly to assess the record requires reversal here.

C. The Decision Below Conflicts With The Policies Underlying Rule 56.

The standard applied by the court below cannot be reconciled with the policies underlying Rule 56 because it eliminates, in large measure, summary judgment in age discrimination cases. *See Treese v. Chevron Corp.*, 666 F. Supp. 76 (W.D. Pa. 1987) (noting that summary judgment in an age discrimination case "is now nearly impossible" in the Third Circuit), *aff'd without opinion*, —— F.2d —— (3d Cir. March 24, 1988). Because "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole . . . ," *Celotex Corp. v. Catrett*, 477 U.S. at 327, the decision below should not stand.

An ADEA plaintiff is unquestionably entitled to a jury trial on any disputed material issue of fact. 29 U.S.C. § 626(c)(2) (1982); *see also Lorillard v. Pons*, 434 U.S. 575, 585 (1978). But "Rule 56 must be construed with due regard . . . for the rights of persons opposing [a plaintiff's] claims . . . to demonstrate in the manner provided by the Rule, prior to trial, that the claims . . . have no factual basis." *Celotex Corp. v. Catrett*, 477 U.S. at 327. Summary judgment, therefore, serves a crucial function in age discrimination cases: it isolates factually unsupportable claims and "prevent[s them] from going to trial with the attendant unwarranted consumption of public and private resources." *Id.*

The decision below greatly undermines this function. By permitting Respondent to present his case to a jury without showing factual support for his case, it endorses

the "unwarranted consumption" of resources that Rule 56 was designed to forestall. Because many courts, like the court below, are now reluctant to grant summary judgment in employment discrimination cases, more employment-related civil rights cases—over 15 percent—went to trial during the twelve-month period ending June 30, 1986 than any other category of federal question and diversity cases. Over one-third of these trials were before a jury.[16]

Judicial resources have been—and, if the decision below stands, will increasingly be—expended unnecessarily on factually unsupportable employment discrimination claims.[17] Faced with appeals and post-trial motions for judgment notwithstanding the verdict, the federal courts have frequently overturned jury verdicts in ADEA cases.[18] This fact suggests, at the least, that many such cases should not have been submitted to a jury. *Cf. Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 251 ("The Court has said that summary judgment should be granted

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[16] Reports of the Proceedings of the Judicial Conference of the United States, Annual Report of the Director of the Administrative Office of the United States Courts (1986), Table C-4 (at 206).

[17] Thus, even courts that recognize the futility of trial, given the absence of adequate evidence of discrimination, have nonetheless declined to grant summary judgment. *See Thornbrough v. Columbus & Greenville Railroad Co.*, 760 F.2d at 646 n.22 (court refused to grant summary judgment despite the "sparseness of proof"; employee alleged only that younger employees were retained and hired and pointed to no circumstantial evidence supporting his claim).

[18] *See, e.g., Simpson v. Midland-Ross Corp.*, 823 F.2d 937 (6th Cir. 1987) (reversing district court's denial of employer's motion for j.n.o.v.); *Wilkins v. Eaton Corp.*, 790 F.2d 515 (6th Cir.) (same), *reh'g denied*, 797 F.2d 342 (6th Cir. 1986); *Sherrod v. Sears, Roebuck & Co.*, 785 F.2d 1312 (5th Cir. 1986) (same); *Chappell v. GTE Products Corp.*, 803 F.2d 261 (6th Cir. 1986), *cert. denied*, 107 S.Ct. 1375 (1987) (affirming j.n.o.v.); *La Montagne v. American Convenience Products, Inc.*, 750 F.2d 1405 (7th Cir. 1984) (same).

where the evidence is such that it 'would require a directed verdict for the moving party' ").

In short, the summary judgment standard established by the court below strikes an improper balance between the purposes underlying the ADEA and Rule 56. Only by requiring ADEA plaintiffs, faced with summary judgment, to produce evidence establishing an inferential link between an employment decision and age discrimination can this Court restore summary judgment procedure to its proper role in employment discrimination litigation. Respondent's failure to forge that critical link requires reversal here.

CONCLUSION

For the reasons set forth above, the judgment below should be reversed.

Respectfully submitted,

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